

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

JANE C. FORRESTER WINNE, et al., CIVIL ACTION

Plaintiffs

Docket No: 1:16-cv-229-JDL

-versus-

NATIONAL COLLEGIATE STUDENT

LOAN TRUSTS, et al.,

Defendants

Transcript of Proceedings

Pursuant to notice, the above-entitled matter came on for **Oral Argument** held before **THE HONORABLE JON D. LEVY**, United States District Court Judge, in the United States District Court, Edward T. Gignoux Courthouse, 156 Federal Street, Portland, Maine on the 1st day of August, 2017 at 10:00 a.m. as follows:

(Appearances on next page)

Dennis R. Ford
Official Court Reporter

(Prepared from manual stenography
and computer aided transcription)

Appearances:

For the Plaintiffs: Cynthia A. Dill, Esquire

For Defendant National Collegiate Trusts:

Michael D. Alltmont, Esquire

Bryan C. Shartle, Esquire

For Defendant Turnstile Capital:

Adam J. Shub, Esquire

For Defendant U.S. Bank:

John J. Aromando, Esquire

For Defendant Wilmington Trust:

Roy Arnold, Esquire

Rebecca G. Klotzle, Esquire

For Defendant First Marblehead:

Amanda R. Lawrence, Esquire

John W. Van Lonkhuyzen, Esquire

1 (Open court. Parties present).

2 THE COURT: Good morning. We are convening in
3 the case of Forrester Winne versus National Collegiate
4 Student Loan Trusts 2005-1, et al. This is docket
5 16-cv-229.

6 Counsel, I would like you to note your appearances
7 for the record and please indicate whether you'll be
8 arguing today or not.

9 MS. DILL: Good morning, Your Honor. Cynthia
10 Dill for the plaintiffs and I'm responding to the
11 motions to dismiss.

12 THE COURT: Thank you.

13 MR. ALLTMONT: Good morning, Your Honor.
14 Michael Alltmont for the National Collegiate Student
15 Loan Trusts arguing for the motion to dismiss.

16 MR. ARNOLD: Your Honor, Roy Arnold on behalf
17 of Wilmington Trust Company. I'll be arguing the
18 motion to dismiss for lack of personal jurisdiction and
19 for failure to state a claim on behalf of Wilmington
20 Trust.

21 THE COURT: Thank you.

22 MR. VAN LONKHUYZEN: John Van Lonkhuyzen on
23 behalf of First Marblehead Corporation, now Cognition.
24 I will not be arguing. I'll defer to Amanda Lawrence.

25 MS. LAWRENCE: Good morning, Your Honor.

1 Amanda Lawrence on behalf of First Marblehead
2 Corporation, now known as Cognition Financial
3 Corporation, and I'm going to argue.

4 THE COURT: Thank you.

5 MR. AROMANDO: Good morning, Your Honor. John
6 Aromando for U.S. Bank. I will not be arguing this
7 morning.

8 MR. SHARTLE: Good morning, Your Honor, Brian
9 Shartle on behalf of the National Collegiate entities.
10 I will not be arguing and defer to my co-counsel, Mr.
11 Alltmont.

12 THE COURT: Thank you.

13 MS. KLOTZLE: Rebecca Klotzle from Curtis
14 Thaxter on behalf of Wilmington Trust Company and I
15 will not be arguing.

16 THE COURT: Thank you.

17 MR. SHUB: Adam Shub, Your Honor, Preti
18 Flaherty, and also for the trusts and I will not be
19 arguing today.

20 THE COURT: Thank you. Anyone else?

21 UNIDENTIFIED SPEAKER: I'm not a lawyer.

22 THE COURT: All right, and you will not be
23 arguing. All right, we have several motions, but what
24 I would like to do is take up the motion to dismiss
25 filed by the trust first.

1 I'll hear from counsel on that. I'll hear the
2 plaintiff's response and then finally reply and then
3 move on to Wilmington Trust's motion to dismiss. Then
4 move on to First Marblehead's motion to dismiss and
5 then move on to the plaintiff's motion to supplement
6 the record.

7 And so with that, Mr. Alltmont, I'll hear from you
8 first. Please step up.

9 MR. ALLTMONT: Good morning, Your Honor.
10 Michael Alltmont on behalf of 13 of the 17 National
11 Collegiate Trusts on their motion to dismiss the second
12 amended complaint as to the 13 trusts.

13 Your Honor, the issue before the Court is not
14 terribly complicated. The four plaintiffs have not
15 alleged any relationship whatsoever with the 13 trust
16 defendants. They've admitted as much.

17 They have not been the subject of any lawsuits
18 filed by these 13 trusts. They have not been the
19 subject of any collection activity by these 13 trusts.
20 They readily admit that they have no relationship
21 whatsoever with these 13 trusts.

22 What they're trying to do, Your Honor, is clump
23 them in with the four trusts whom they do have claims
24 against. Those four trusts, they interpret a claim and
25 expect to defeat those claims at a later date.

1 The plaintiffs allege that because the 13 trusts
2 were formed in a similar manner as the four that have
3 answered because the 13 are -- were created pursuant to
4 the same program, that they have a similar name, that
5 they have similar attorneys, that they should be
6 clumped together with the other four. That does not
7 create standing. That does not create a case or
8 controversy for these four plaintiffs against these 13
9 trusts.

10 The law is clear. Each plaintiff must allege a
11 case or controversy against at least one of the
12 defendants and as to these 13, the plaintiffs have not
13 done that.

14 THE COURT: In the Plumbers' Union decision,
15 the 1st Circuit seemed to recognize the possible
16 exception -- they called it a qualification -- to that
17 principle and, that is, essentially if -- it
18 necessarily follows that if the plaintiffs establish
19 liability against the four trusts who have answered,
20 that it would establish liability against the remaining
21 13, then the plaintiffs, as representatives of the
22 class, might be permitted to proceed.

23 So the question is why, in your view, does the
24 plaintiff not meet that standard in this case?

25 MR. ALLTMONT: Well, in Plumbers' Union, Your

1 Honor, there were three plaintiffs who brought a case
2 against eight distinct trusts. Like in this, the eight
3 distinct trusts were formed in a similar manner, the
4 eight distinct trusts had similar names, similar
5 representation. The three plaintiffs in that case were
6 investors who only had investments in two of the
7 trusts.

8 The court found that all of those similarities as
9 to the eight trusts -- and Plumbers' Union was a
10 class-action -- all those similarities did not absolve
11 the plaintiff -- the plaintiffs from their obligation
12 to establish a case or controversy against all of the
13 trusts and, in fact, affirmed the District Court's
14 dismissal of the six trusts for whom there was no
15 relationship with the plaintiffs.

16 So Plumbers' Union, in fact, supports our position
17 that the plaintiffs -- even if the trusts are similar
18 in nature, even if they were formed pursuant to the
19 same program, that the plaintiffs still have an
20 obligation to establish standing to establish a case or
21 controversy against each defendant.

22 THE COURT: So is it your view that -- and
23 this also goes to the question of whether the complaint
24 states a claim against these 13 trusts -- that in the
25 absence of any specific factual allegations regarding

1 the 13 trusts, apart from their existence, that
2 Plumbers' Union can't apply here, that there's got to
3 be something more than a common name and a common
4 origin?

5 MR. ALLTMONT: But again, Your Honor, in
6 Plumbers' Union, the court affirmed the dismissal of
7 the six trusts who were not in -- in a relationship
8 with the two plaintiffs. The facts are almost
9 identical.

10 THE COURT: It's true, I agree with you. One
11 gets the sense reading Plumbers' Union though that the
12 panel in that case was somewhat limited by Circuit
13 authority, but nonetheless went ahead and acknowledged,
14 sort of volunteered, this possible exception, kind of
15 put it out there for the rest of us in the world to
16 deal with it, and my question to you is what more would
17 the plaintiff have to have alleged in the complaint to
18 bring your clients into -- under the rubric of the
19 qualification that the 1st Circuit recognized in
20 Plumbers' Union?

21 MR. ALLTMONT: I believe that the 1st Circuit
22 was recognizing that the plaintiffs may not have -- the
23 plaintiff may not -- the named plaintiff may not have a
24 complete -- the named plaintiff may not have complete
25 similarity with all of the class members as to the

1 claims against the defendants, but could still
2 represent the class, but there was a bright-line in
3 that case which I think applies here, which is that the
4 plaintiffs still must have a claim against each of the
5 defendants.

6 In my appreciation -- my reading of Plumbers'
7 Union was that because there was no relationship
8 whatsoever with the six trust defendants, that they
9 were dismissed. The 1st Circuit affirmed the dismissal
10 of those six trusts.

11 So while they acknowledge some exceptions, that a
12 plaintiff need not have a full similarity with all of
13 the perspective class members, that you still must have
14 standing, still must establish a case or controversy as
15 to the defendants.

16 THE COURT: Right. Let me challenge you on
17 that.

18 Reading from Plumbers' Union, the qualification on
19 which we reserve judgment is one where the claims of
20 the named plaintiffs necessarily give them, not just
21 their lawyers, essentially the same incentive to
22 litigate the counterpart claims of the class members
23 because establishment of the named plaintiffs' claim
24 necessarily establishes those of other class members.

25 So there the court's not talking about

1 establishing standing by the named plaintiff as against
2 these other defendants, it's establishing that they
3 have the same incentive to litigate the counterpart
4 claims of the class members. The same incentive to
5 litigate the counterpart claims of the class members,
6 which I interpret as being something less than pure,
7 unadulterated standing; do you disagree?

8 MR. ALLTMONT: Your Honor, I believe that the
9 incentive to litigate -- the incentive to litigate does
10 not absolve a plaintiff of their constitutional
11 requirement to establish a case or controversy against
12 a particular defendant and again, that -- that a
13 particular plaintiff may not have the exact set of
14 claims as all claim members does not disqualify them
15 from bringing a claim against a defendant whom has
16 allegedly harmed them as well as all of the class
17 members, but Plumbers' Union does stand for the
18 proposition that the named plaintiff still must have a
19 claim against each defendant.

20 It may not be exactly the same as all the class
21 members, but each plaintiff must have a claim against
22 each of the defendants in order to establish a case or
23 controversy.

24 Ultimately, the court decided that as to six of
25 the trusts with whom the plaintiffs in Plumbers' Union

1 did not have any relationship ultimately decided --
2 determined that there was no standing, that there was
3 no case or controversy as to those six and dismissed
4 the claims as to those six.

5 The circumstances are identical in this case. The
6 four plaintiffs do not have any relationship, by their
7 own admission, with the 13 trusts who filed the instant
8 motion. They have no claims, they have no -- they have
9 not been sued, they have not been subject to collection
10 action by any of the 13 defendants.

11 They're obligated to state a case or controversy.
12 The law is clear and I think Plumbers' Union supports
13 our motion in that the unrelated trusts for whom the
14 plaintiffs have no relationship have not been harmed,
15 do not allege to have been harmed at all, still need to
16 state a case or controversy.

17 THE COURT: All right. Let me ask you to turn
18 to your argument that the complaint doesn't state a
19 claim against your clients.

20 Viewing the complaint in the light most favorable
21 to the plaintiffs, I see it as alleging that your
22 clients share common ownership and management with the
23 four other trusts; that your clients have filed
24 lawsuits against Maine citizens to collect the bulk of
25 its student loans; that, according to plaintiffs, that

1 loan debt is debt to which your clients allegedly are
2 not entitled to because of the Education Resources
3 bankruptcy. Why isn't that enough to state a claim?

4 MR. ALLTMONT: Your Honor, it's not enough to
5 state a claim. You have to look at the claims that the
6 plaintiff has alleged in this lawsuit. The plaintiff
7 has alleged Fair Debt Collection Practices Act, Maine
8 Fair Debt Collection Practices Act, Maine Unfair Trade
9 Practices Act, fraud and -- fraud and breach of
10 contract. Each one of those allegations, both the
11 statute and under common law tort, require some direct
12 relationship between the plaintiff and defendant.

13 We're at the motion to dismiss stage. We're --
14 while plaintiff has styled this as a class-action,
15 we're at the stage where each of these four plaintiffs
16 needs to establish their claims against each of the
17 defendants.

18 In fact, that's exactly what this Court required
19 of plaintiff in its January order permitting the
20 plaintiffs to file a second amended complaint
21 contingent upon the plaintiff identifying what each of
22 the defendants has done. There's 26 defendants in this
23 case and plaintiffs were required to identify what each
24 of the defendants have done to them. As to the trust,
25 the plaintiffs failed to do that.

1 The plaintiffs then identified particular claims
2 against four of the trusts and those four trusts have
3 answered, but they have not identified any claims
4 against the other trusts and the allegations are
5 particularized. The claims alleged in this complaint
6 are direct actions, not collective.

7 So plaintiff hasn't alleged any claims that are
8 collective in nature and accordingly, she must allege a
9 direct case or controversy as to each of the
10 defendants.

11 THE COURT: And why should I not treat the
12 claim that your clients, as plaintiff says with respect
13 to the other four trusts, as a general matter what they
14 all share in common is that they are -- attempting to
15 collect student debt in Maine to which they don't have
16 title.

17 Why isn't that sort of -- that broad allegation,
18 which is particularized as to each trust, enough to
19 survive dismissal?

20 MR. ALLTMONT: That allegation, while alleged
21 broadly, is exemplary of the problems with the first
22 draft of the second amended complaint which failed to
23 allege particular acts of harm as to each defendant.

24 The plaintiffs can allege -- the plaintiffs can
25 allege whatever they like, against whomever they like,

1 but it does not absolve them of their obligation to
2 allege particular facts as to particular defendants and
3 under Article III standing to allege a harm or an
4 alleged harm by a particular defendant and the
5 plaintiffs have not done that here.

6 They've done it as to four of the defendants, four
7 of the trusts who have answered the complaint, and I
8 expect to defeat those claims at a later date, but as
9 to these 13 trusts, they haven't alleged any harm
10 personal to them, and that's what they're required to
11 do to establish Article III standing.

12 Even on a class-action, even in a class-action,
13 they still have to have their own personal claims in
14 order to represent the class, and they just --

15 THE COURT: You're coming back -- let me
16 interrupt -- you're coming back to standing. But with
17 respect to stating a claim, why isn't it enough for the
18 plaintiffs to assert that 17 trusts, each of the 17
19 trusts are attempting to collect student loan debt in
20 the state of Maine for which none of them have title;
21 does that not state a claim?

22 MR. ALLTMONT: As to each of the plaintiffs?
23 No, it doesn't.

24 THE COURT: As to each of the defendants.

25 MR. ALLTMONT: As to each of the defendants?

1 No, it doesn't, Your Honor. It's overly vague. It
2 doesn't meet the pleading standards and that's exactly
3 what they were required to do when they filed the
4 second amended complaint.

5 They maintain some of those broad allegations from
6 the original version of the second amended complaint,
7 which is objectionable. It's exactly the reason why
8 the 13 trusts filed their motion to dismiss.

9 So no, Your Honor, I don't believe that that
10 allegation sufficiently states a claim against all of
11 the trusts, that they were required to do something
12 more, and behind that broad allegation were specific
13 allegations brought by the four plaintiffs, over the
14 course of 150 some odd paragraphs, that did state
15 claims, which are -- that did state claims against four
16 of the trusts.

17 So looking at the complaint in its entirety, they
18 have not sufficiently pled -- pursuant to Rule 8, they
19 have not sufficiently pled claims against the 13 trusts
20 who have brought the motion today.

21 THE COURT: Thank you, Mr. Alltmont.

22 MR. ALLTMONT: Thank you.

23 THE COURT: Attorney Dill.

24 MS. DILL: Thank you, Your Honor. I'll just
25 cut to the chase. I think the Plumbers' Union case

1 does provide an exception to the general rule, which
2 was described by Attorney Alltmont, but in this case,
3 the alignment of incentives couldn't be clearer.

4 I mean if we had a process by which we had a list
5 of the loans that are subject to the state court
6 collection activity, a deposition by the plaintiffs'
7 trustee or information from the plaintiffs' trustee as
8 to which loans were purchased by TERI, a deposition
9 perhaps of the American Education Services that
10 identified which loans were purchased by TERI, we could
11 establish that loans purchased by TERI are not properly
12 the subject of a collection action in state court.
13 That would be true for Sarah Coffey, that would be true
14 for Vickie McMullen, Karin Hills and every other
15 potential member of the class.

16 This notion that somehow every single person who
17 has been subject to the collusion that the plaintiffs
18 allege is among these defendants is ridiculous and it
19 makes Rule 23 absolutely useless.

20 So I would argue that, first, that the plaintiffs
21 have, in fact, alleged claims against -- or have a
22 relationship with the other 13 trusts by virtue of the
23 plan trustee collecting on these debts.

24 There's allegations in the complaint that Sarah
25 Coffey paid \$7,500 in change, Karin Hills paid \$6,000.

1 There's evidence that money collected by the plan
2 trustee went through the formula that all of these
3 defendants approved and was distributed to these
4 defendants, with the exception of Wilmington Trust.

5 So the 13 trusts have -- if you, I think, take the
6 inferences in the facts, you know, in the light most
7 favorable to plaintiffs, have plaintiffs' money in
8 their bank accounts.

9 These trusts we know are made up of Maine loans.
10 These trusts have sued Maine loan borrowers. It's
11 reasonable to infer that Maine investors, perhaps,
12 invested in these trusts.

13 So the contacts with Maine are there, the
14 alignment of incentives is there and, most importantly,
15 or another important factor is that we don't know who
16 the trusts are. I mean what should be obvious to Your
17 Honor is no one here is the trusts.

18 It's TSI. TSI shows up for all the trusts. TSI
19 was the 30(b)(6) representative of the two trusts in
20 the state court collection action. TSI is representing
21 the trusts in this action and there's a reason for
22 that, and the reason is because the trusts are at war
23 with each other in other parts of the country trying to
24 figure out who owns what.

25 But in Maine, Maine borrowers, we know 372 as of

1 the response from the state court administrator -- I
2 think it's reasonable to infer there's been more since
3 then -- are being barraged with these lawsuits and
4 these defendants would argue that it's too inconvenient
5 for them to respond here. We should instead go to
6 Delaware where it would be much easier for them to file
7 electronic case filings in federal court in Delaware as
8 opposed to in Maine. That's ridiculous.

9 We have a case here and Your Honor has flexibility
10 with respect to deciding when the jurisdiction question
11 has to be answered. It doesn't have to be answered
12 immediately. We could do a phase of discovery as I
13 described earlier and it could be immediately
14 established whether or not there is, in fact, an
15 alignment of issues, incentives --

16 THE COURT: I want to interrupt --

17 MS. DILL: Please do.

18 THE COURT: -- and take you back to something
19 which you mentioned a few moments ago.

20 I understood you to argue that because these
21 trusts are beneficiaries of the benefit two claim along
22 with the other four trusts --

23 MS. DILL: Yes.

24 THE COURT: -- that they're necessarily, at
25 the very least, benefiting from any money that you

1 allege was unlawfully collected by the four trusts that
2 you have evidence about. They didn't submit a plan and
3 as creditors, they're all benefiting by virtue of, as I
4 just indicated, the allegation that at least four of
5 them engaged in unlawful collection activities in the
6 state of Maine; do I have that right?

7 MS. DILL: No. What I think happened, and
8 what -- you know, the complaint, I think, is -- you
9 could infer is that when Sarah Coffey and Vicky
10 McMullen settled for \$7,500, that that was collection
11 activity being taken by the plan trustee. I don't know
12 who else could have done it.

13 I mean apparently there -- there could be a lot of
14 other entities, but I think it's reasonable to infer
15 that the plan trustee, since he is the one legally
16 obligated to collect the loans, was behind the
17 collection originally of the \$7,500 settlement and the
18 \$6,000 settlement; that that money went into the plan
19 trust and through the formula went out to all these
20 defendants and that's why the plaintiff trustee wants
21 to get activity going because they are raking in big
22 bucks collecting all these loans that TERI purchased.

23 So these defendants know the plan trustee is
24 collecting on these loans and they know that these
25 loans were purchased by the plan trustee. At the same

1 time, these defendants are going into Maine state
2 courts and suing student borrowers on these same loans.

3 THE COURT: So help me understand then the
4 commonality of the individual plaintiffs' claims
5 against the four trustees who have answered and the
6 remaining 13 trusts.

7 MS. DILL: Because if you decide that loans
8 purchased by TERI through the plan trustee are not the
9 property of the trusts, then all loans purchased by the
10 plan trustee in Maine state courts will be affected.

11 I mean the issue is so simple, right? I mean we
12 decide what loans are subject to lawsuits, what loans
13 have been purchased by TERI, what loans are subject to
14 lawsuits by the trust and TSI and U.S. Bank and all the
15 other defendants, what loans have been purchased by
16 TERI and then we have a list of the cases that these
17 defendants have wrongfully pursued.

18 More importantly, Your Honor would have the power
19 to issue an injunction to say trusts, U.S. Bank, TSI,
20 you can no longer bring a state court collection action
21 on a loan that has been purchased by TERI.

22 THE COURT: Let me ask you this. Going to the
23 argument that your complaint fails to state a claim as
24 to these 13 trusts, of course you don't allege any
25 actual facts regarding these 13 trusts relative to debt

1 collection or anything other than that they are
2 essentially trusts similarly situated to those of the
3 four who have answered. Is that enough?

4 MS. DILL: I believe that the section in the
5 complaint that talks about the class-action makes it
6 clear that there are -- yes, there are four plaintiffs
7 and four trusts identified, but also there is an
8 allegation that there are 372 cases brought in Maine
9 state courts by these trusts, that these trusts are
10 knowingly bringing claims --

11 THE COURT: Well, you're saying these trusts.
12 The information you provided is not specific to any of
13 the trusts; is it?

14 I can't look at what you've provided in
15 supplementation of the complaint and satisfy myself
16 that any one of these 13 specific trusts have actually
17 brought an action in the state of Maine, right?

18 MS. DILL: Well, I think you -- I don't know
19 how else you can infer that it's these trusts. If
20 there are only 17 trusts and there are 372 cases
21 brought by trusts in Maine --

22 THE COURT: Um-hmm.

23 MS. DILL: -- and we know that each one of the
24 trusts is a named plaintiff, I don't know what else you
25 could infer that it's not these trusts. I mean of

1 course it's these trusts. These are the trusts.

2 THE COURT: You've established that each of
3 these 13 trusts is a named plaintiff in a collection
4 action in the state of Maine?

5 MS. DILL: I've established that in additional
6 pleadings, not in the original complaint.

7 THE COURT: Well, where did you establish
8 that?

9 MS. DILL: If I may, in the plaintiffs'
10 response to the First Marblehead Corporation's motion
11 to dismiss, I provided the Court -- and it was
12 incorporated by reference in subsequent pleadings -- I
13 provided the court information from Diane Cavanaugh,
14 who is the state court person who responded to my
15 request for research.

16 She indicated in an e-mail to me that she did the
17 research and that every single trust that was
18 identified -- and it's Document 202-7 -- every single
19 trust that's identified as a defendant in this case is
20 a plaintiff in state court.

21 So they have purposefully availed themselves of
22 the laws and the protections of Maine state court
23 system and I believe that that is enough to hold them
24 to account at least for, like I said, limited discovery
25 to discern whether or not, in fact, they're suing on

1 loans they don't own.

2 THE COURT: How would you limit the discovery?

3 MS. DILL: I would -- I think -- like I said,
4 I think it could be quite easy. We could notice the
5 deposition of the plan trustee, ask him to bring a list
6 of Maine loans, or loans that originated in Maine that
7 were purchased by TERI, do follow-up with Ms. Cavanaugh
8 and get the entire -- and the state court administrator
9 and get a list of the cases that are pending in Maine
10 state courts and the loans that are the subject of
11 those cases and match them up.

12 If the loan that is the subject of the state court
13 collection action brought by the trust is one that was,
14 in fact, purchased by TERI, we have an answer.

15 In addition, the American Education Services has
16 provided information to me for my four named
17 plaintiffs, which Your Honor can review in Documents
18 202-2, 202-3 and 202-4. These are information --
19 documents that were provided by American Education
20 Services, which was the servicer for those loans, that
21 shows that the guarantor paid off the loan, and we know
22 that the guarantor was TERI and we know that if TERI
23 paid off the loan, then the trusts don't own it.

24 So if the plan to depose the plan trustee somehow
25 went south, we could simply subpoena the financial

1 activity summaries from the American Education Service
2 for these loans and find out if their loans -- if their
3 information shows that the loans that the trusts are
4 suing on were purchased by TERI.

5 That not only establishes that the trusts don't
6 own the loan, but the trust knows they don't own the
7 loans because the trusts claim that they are the
8 custodian of the AES records and they used that
9 position in their state court litigation cases.

10 They swear in affidavits that they are the
11 custodians of the American Educational Services'
12 records and that therefore they are entitled to this
13 amount, and what they failed to say to the state courts
14 is that the AES records, in fact, show that the loans
15 were purchased by TERI.

16 THE COURT: All right. Thank you, Attorney
17 Dill.

18 MS. DILL: Yes.

19 THE COURT: Attorney Alltmont, you get to
20 respond.

21 MR. ALLTMONT: Your Honor, as a quick initial
22 matter, the statements regarding the sale of the
23 plaintiffs' loans to TERI is false. The statement that
24 there's anything in the deposition that's related to
25 TSI alluding to such is false. There's not been a

1 deposition of AES.

2 Plaintiff is making this allegation, which will be
3 flushed out, it will be clarified as to the four NCT
4 trusts who answered. The allegations are absolutely
5 false.

6 Plaintiff -- plaintiffs are arguing also that
7 there's personal jurisdiction as to the 13 trusts that
8 moved to dismiss the second amended complaint as to
9 them. The issue is not personal jurisdiction. The
10 issue is whether or not they have standing to sue those
11 13 trusts, whether they've established or alleged a
12 case or controversy against those 13 trusts.

13 That's a completely different legal issue than
14 personal jurisdiction. We haven't raised that. We've
15 raised standing. We've raised whether they've stated a
16 claim and they have not as to the 13 trusts.

17 The plaintiffs allege that the plan trust did --
18 the plan trustees did collections and distribute funds
19 to all of the defendants and that's not accurate even
20 per the allegations. Any monies collected for a
21 particular trust went back to that trust.

22 So as to McMullen and Coffey from the referral
23 note, any monies collected would have gone back to the
24 trusts who were named in this complaint, who answered
25 the complaint, but it did not go all the way back to --

1 THE COURT: Is that fact established in the
2 record of the case in any way?

3 MR. ALLTMONT: I don't believe that plaintiff
4 even alleged that the monies went back to all of the
5 defendants, but she stated it in her oral argument just
6 now and I wanted to address it.

7 THE COURT: Okay.

8 MR. ALLTMONT: And furthermore, that the
9 impact of the case against the four trusts who have
10 answered, who plaintiff at least has standing to sue,
11 may impact these other 13 trusts is irrelevant to
12 whether she has Article III standing and has alleged a
13 case or controversy against these defendants.

14 They're -- it's common, it's frequent that a case
15 is going to impact other defendants who are not named.
16 It happens every day, but that does not give her the
17 standing to sue those other defendants. Otherwise,
18 anybody would be able to sue anybody all of the time
19 and the courts would be flooded with lawsuits.

20 The law requires that the plaintiffs allege a case
21 or controversy against each of the defendants and
22 plaintiffs have not done that in this case as to these
23 13 trusts, and therefore dismissal of the claims
24 against them is appropriate.

25 THE COURT: Thank you, Attorney Alltmont.

1 MS. DILL: Your Honor, may I just respond
2 briefly?

3 THE COURT: Actually, Attorney Dill, I'm going
4 to ask you not to respond briefly. We have other
5 issues to deal with today and I want to stay on track.
6 Thank you.

7 I'm going to turn now to Wilmington's motion to
8 dismiss. Attorney Arnold.

9 MR. ARNOLD: May it please the Court, Roy
10 Arnold from Reed Smith LLP on behalf of Wilmington
11 Trust Company.

12 The parties in this case, the plaintiffs and
13 defendants, disagree about many things, but what we do
14 know with respect to Wilmington Trust's motion to
15 dismiss for lack of personal jurisdiction is there's
16 agreement among the plaintiffs and plaintiffs' counsel
17 and Wilmington Trust on certain items, certain specific
18 important facts.

19 First, Wilmington Trust acted solely as what is
20 called an owner trustee, quote-unquote. It's a
21 statutory trustee under Delaware corporate law,
22 specific statutory trustee role and it solely acted in
23 that respect.

24 We've presented publicly available governing
25 instruments. That's another defined term under

1 Delaware law. The governing instruments are the trust
2 agreement, the administration agreement, the 2009
3 special servicing agreement that Your Honor cited at
4 length in a prior hearing and motion, and the servicer
5 consent matter. Those are Exhibits A, B, C and D of
6 Document 157, declaration of Dorri Costello of
7 Wilmington Trust. Those publicly available documents,
8 exemplars, with respect to a particular trust, but
9 they're publicly available and they're undisputed.
10 There's no objection to those documents in the record.

11 Those governing instruments specifically delineate
12 and govern Wilmington Trust's role as statutory or
13 owner trustee with respect to the various trusts at
14 issue in this case, and what does the record show that
15 Wilmington Trust did factually, what is alleged?

16 Wilmington Trust is a Delaware charter trust
17 company. It's principal place of business is in
18 Wilmington, Delaware. The role of statutory or owner
19 trustee confers no ownership interest on Wilmington
20 Trust. It's a misnomer to suggest it has any ownership
21 interest; it doesn't.

22 It isn't a beneficial owner of the trust, has no
23 offices or other locations in Maine and no receipt of
24 payment -- there was no receipt of payment in Maine.
25 So it's a very limited, statutorily defined and, by

1 agreement, ministerial role that is governed by the
2 governing instruments.

3 So let's look at the governing instruments and
4 understand what those governing instruments really say
5 about what Wilmington Trust does or doesn't do because
6 what it shows is -- because the plaintiffs in this
7 case, in seeking to exercise personal jurisdiction over
8 Wilmington Trust, where there's no alleged contact
9 directly with Maine, it's essentially alleging well, we
10 want to impute, we want to attribute the contacts of
11 other alleged servicer defendants to Wilmington Trust,
12 and the implication there is we have control and we can
13 affect the default and servicing activities of these
14 defendants.

15 The problem with that bare legal allegation of
16 agency or control, it doesn't bear out under the very
17 documents that govern the relationship between
18 Wilmington Trust and the trusts.

19 So when we look at the specific agreements, the
20 governing instruments of this relationship, first we
21 pointed Your Honor to the trust agreement, Section 802,
22 which talks about specific authority, but more
23 fundamentally, we pointed Your Honor back to the
24 special servicing agreement that Your Honor studied
25 with respect to U.S. Bank's motion.

1 Regardless of the outcome of the U.S. Bank's
2 motion, plaintiff wants to just say well, because you
3 denied the motion as to U.S. Bank, you have to deny it
4 against Wilmington Trust without even appreciating the
5 difference or even examining the distinctions between
6 the different roles.

7 So under the special servicing agreement,
8 Wilmington Trust isn't a party. It executed the
9 document solely in its capacity as statutory trustee or
10 owner trustee, not in its individual capacity. It
11 didn't have a role with respect to the implementation
12 or oversight of servicing the student loans. Nowhere
13 in that agreement is Wilmington Trust directed to
14 become involved in the servicing of the loans that
15 comprise the trust assets. The servicer consent letter
16 is consistent in that regard, Your Honor, again making
17 it clear that Wilmington Trust is executing that letter
18 solely in its capacity as trustee, not in its
19 individual capacity.

20 But the real kicker in the -- the agreement that
21 is just fatal to plaintiffs' bare conclusory
22 allegations is the administration agreement. Just to
23 put a point on it, the administration agreement --
24 Exhibit B, Document 157 of the Dorri Costello
25 declaration -- that agreement in section 1(c)(iv), sub

1 four, specifically places the duties with respect to
2 delinquent or defaulted student loans with the
3 administrator, not the owner trustee or the statutory
4 trustee.

5 Those duties include -- the ones that don't belong
6 to Wilmington Trust -- the duty to retain and employ
7 agents to collect on such student loans and commence
8 any actions or proceedings the agency deems necessary
9 in connection with such collection efforts on such
10 student loans. That's the administration agreement.

11 So it specifically assigns the responsibility for
12 that and we don't have that responsibility at
13 Wilmington Trust.

14 Administration agreement, section 5, also makes it
15 clear that the administrator shall not be subject to
16 the supervision of the issuer or the owner trustee with
17 respect to the manner in which it accomplishes the
18 performance of its obligations under the administration
19 agreement. That's section 5.

20 So when you look at those agreements, those
21 agreements fatally undermine the allegations the
22 plaintiffs have made in a very conclusory manner.
23 They've done it in this group pleading, they stick
24 Wilmington Trust's name in among defendants, but the
25 problem is they don't appreciate the statutory and

1 specific agreements governing the relationship.

2 It's a very limited ministerial role and it's a
3 role that's required by the Delaware statute because a
4 trustee has to be a business or person that is either a
5 person -- resident in the state or a business that has
6 its principal place of business in the state to avail
7 itself of the Delaware statutory trust law.

8 Now, when you understand and appreciate those
9 specific governing instruments with respect to the
10 relationship, it becomes clear that Wilmington Trust
11 has not engaged in activities with respect to the state
12 of Maine, and the plaintiff has made insufficient
13 allegations. And even more important, Your Honor, in
14 this context, as Your Honor noted in your prior
15 decision on personal jurisdiction, the fact of the
16 matter is the plaintiff bears a burden of proof here to
17 come forward with prima facie evidence to sustain a
18 burden of proof with respect to the exercise of
19 personal jurisdiction.

20 So the allegations and the lack of evidence
21 combine to compel the dismissal of Wilmington Trust
22 with respect to -- due to the lack of personal
23 jurisdiction.

24 The same issue, the same lack of involvement in
25 determining -- selecting the servicers or exercising

1 oversight over them also inform the issues with respect
2 to 12(b)(6) and the fact that Wilmington Trust did not
3 engage in debt collection activities, and certainly
4 there's no allegation that we regularly engaged in
5 those activities in the state of Maine.

6 So the issues do fit somewhat hand in glove with
7 each other, but when you look at those underlying
8 governing instruments and how they fit together, and
9 how very limited and ministerial the role is of
10 Wilmington Trust, we would ask Your Honor to dismiss
11 Wilmington Trust for lack of personal jurisdiction or,
12 in the alternative, for failure to state a claim under
13 the failure -- federal and state debt collection
14 practice section.

15 THE COURT: Thank you, Mr. Arnold.

16 MR. ARNOLD: Thank you.

17 THE COURT: Attorney Dill. Attorney Dill,
18 Wilmington Trust in this case appears as the owner
19 trustee in the same arrangement under which U.S. Bank
20 appeared as the administrator.

21 The documents that were critical to my
22 determination of U.S. Bank's participation in this case
23 it seems to me to, as Mr. Arnold has just outlined it,
24 point in the direction that Wilmington does not have
25 liability in this case as you've pled it.

1 Why should I conclude otherwise? The question is
2 control, right?

3 MS. DILL: Well, first of all, the best laid
4 plans of 2007 for all these defendants blew up in 2008.
5 So these documents, while they're important -- and he's
6 probably right, I don't understand them, they're mind
7 numbingly boring -- but it seems to me they don't
8 really apply. They do not govern the relationships
9 among these defendants.

10 THE COURT: If the documents don't control,
11 what does? What facts have you asserted that would
12 create any type of responsibility on the part of
13 Wilmington?

14 MS. DILL: Well, Wilmington Trust wants to say
15 on the one hand it's the owner trustee and signed the
16 documents -- is ministerial.

17 Wilmington Trust made a lot of money off of Maine
18 students. Every single time it formed one of these
19 trusts, it made money. Every single time it signed one
20 of these documents, it made money.

21 Wilmington Trust -- the documents they refer to
22 says that it's in charge of signing the documents that
23 would transfer loans from the trust to TERI.
24 Wilmington Trust, I think it's reasonable to infer,
25 would also sign the documents that hired the loan

1 servicers.

2 So on the one hand, it makes money selling the
3 trusts to TERI; on the other hand, it makes more money
4 signing documents to --

5 THE COURT: Making money doesn't create
6 liability.

7 MS. DILL: No, but --

8 THE COURT: What is it that you've alleged
9 that would create liability on the part of Wilmington?

10 MS. DILL: Wilmington Trust, I allege, is
11 the -- acts for the trusts; that the trusts, in fact,
12 according to my understanding of the documents, act
13 through Wilmington Trust and they don't want to have
14 any responsibility for simultaneously acting for the
15 trusts in selling the loans to TERI and acting for the
16 trusts in collecting the loans.

17 I would like to draw your attention to
18 Document 203, which was filed as a correction to
19 Document 202, and this is the motion that was filed by
20 the plan trustee that identifies, as an attachment, all
21 of the entities that are receiving money as a result of
22 the plan trustee's correction.

23 Now, I think it's reasonable to assume that when
24 the trusts approved the bankruptcy plan, they did so
25 through Wilmington Trust, and that when the trusts do

1 everything else, they do it through Wilmington Trust
2 because Wilmington Trust acts as the owner trustee.

3 What we don't know is who are the beneficial
4 owners of the trust and it seems to me, again --
5 certainly we can let Wilmington Trust off, we can add
6 First Marblehead Corp., but if we want to really hone
7 in on the problem, the problem is is that these
8 entities have created such a mess, such a morass, it's
9 so difficult to penetrate who does what and who owns
10 what.

11 None of them claim responsibility. They write up
12 all these fancy documents that say they don't have any
13 responsibility for anything and yet here they are,
14 they're just raking in all this money off the backs of
15 Maine students in Maine courts and all we want to do is
16 find out what's going on, you know.

17 If, in fact, Your Honor is going to order the
18 trusts and their agents to stop collecting debts they
19 don't own, it seems to me we need Wilmington Trust to
20 do it because they're the ones who act for the trust.

21 So I'm not going to dwell on this because it does
22 seem a little extenuated, but at the same time, it
23 seems to me, given the massive litigation among all
24 these defendants behind me that has transpired since
25 2007 and since 2008, flies in the face of Attorney

1 Arnold's argument that somehow we're in agreement that
2 these documents are exactly -- stripped of the
3 relationship among the parties. That's just not true.

4 I mean nobody agrees with anything when it comes
5 to these defendants. Nobody knows who owns what,
6 nobody knows who has responsibility. All we do know is
7 that the plan trustee is collecting a lot of money off
8 of Maine borrowers and so are these defendants, and
9 it's a real problem and this case is, I think, a very
10 straightforward, non- -- this is in no way unfair for
11 these defendants.

12 The question really is the constitutional fairness
13 of drawing them into this case and trying to decipher
14 what roles they had and I think under the
15 constitution -- Delaware law has nothing to do with it.
16 Okay, you can't just document yourself off of -- you
17 know, insulate yourself from jurisdiction in Maine.

18 Wilmington Trust had made a lot of money off of
19 these national student loan trusts. It's not just some
20 ministerial role like some innocent, you know,
21 scrivener down in Delaware signing documents. They are
22 raking in the cash and they signed documents left and
23 right to do all kinds of things that are causing a lot
24 of harm and I don't believe that simply pointing to
25 documents in 2007 negates the allegations of these

1 plaintiffs, that these defendants are colluding, that
2 they know that this is a racket.

3 They know the plan trustee's collecting money,
4 they're recipients of the money. If you look at
5 Document 203, there's a list of every single defendant
6 whose made hundred of thousands of dollars off the
7 collections by the plan trustee. At the same time we
8 know in state court the trusts are collecting the same
9 loans.

10 THE COURT: Thank you.

11 MS. DILL: You're welcome.

12 THE COURT: Attorney Arnold, any final words?

13 MR. ARNOLD: No, Your Honor, other than to
14 point out that Attorney Dill's rhetoric is not evidence
15 and in her prior statement, she has not met her burden
16 of establishing personal jurisdiction.

17 THE COURT: Thank you. Attorney Lawrence, we
18 will turn to First Marblehead's motion.

19 MS. LAWRENCE: Good morning, Your Honor.

20 THE COURT: Good morning.

21 MS. LAWRENCE: Amanda Lawrence on behalf of
22 First Marblehead Corporation, known as Cognition
23 Financial. If it's all right with Your Honor, I'll
24 refer to them as either FMC or Financial -- First
25 Marblehead.

1 THE COURT: Should the pleadings in this case
2 be amended to reflect the current name of your client?

3 MS. LAWRENCE: I think we put in a motion to
4 reflect that, Your Honor --

5 THE COURT: All right.

6 MS. LAWRENCE: -- in connection with -- at the
7 same time our motion to dismiss was filed.

8 THE COURT: All right. Is there any objection
9 to that motion?

10 MS. DILL: No.

11 THE COURT: Thank you.

12 MS. LAWRENCE: Thank you. In our motion to
13 dismiss, we've identified three grounds for why we
14 believe the second amended complaint should be
15 dismissed; lack of personal jurisdiction, lack of
16 standing and failure to state a claim.

17 Before I get to those issues, if it would be all
18 right with the Court, I thought it might be helpful to
19 provide some background as to what my client actually
20 does.

21 THE COURT: Go ahead.

22 MS. LAWRENCE: First Marblehead is a Delaware
23 corporation with its principal place of business in
24 Massachusetts. From 2002 to 2008, it was the
25 structuring advisor for the National Collegiate Student

1 Loan Trust, which essentially means that First
2 Marblehead structured and facilitated the
3 securitization of student loans. If Your Honor's
4 interested, you can see reference to that as Exhibit A
5 to the Morel declaration on Page 5.

6 So First Marblehead did not register to do
7 business in Maine, does not have offices, employees or
8 locations in Maine and doesn't actually employ anyone
9 in Maine for any purpose. That's the Morel declaration
10 at Paragraph 4.

11 Now, the second amended complaint makes reference
12 to two First Marblehead subsidiaries; First Marblehead
13 Education Resources, also known as FMER, and First
14 Marblehead Data Services Inc., also known as FMDS.

15 From March 1, 2009 to 2012, FMER was the special
16 servicer for the trusts, and that's the Morel
17 declaration from Paragraphs 12 and 13, but on April 13,
18 2012, FMER resigned as special servicer and U.S. Bank
19 assumed that role as of, I believe, June 2012.

20 The second amended complaint actually had missed
21 this, although to be fair, they got the entity wrong.
22 They say it's First Marblehead, not FMER, but they
23 admit at Paragraph 37 that First Marblehead resigned as
24 special servicer in 2012.

25 Now, FMDS, the other administrator, was the

1 administrator for the trusts and so First Marblehead
2 sold it in March of 2012. This is the Morel
3 declaration at Paragraph 10. There's also Exhibit E to
4 the Morel declaration at Page 5, which is an SEC filing
5 related to this.

6 So following the sale of FMDS, First Marblehead
7 and its affiliates did not provide any services to the
8 trust in 2012, and I think this is important because I
9 believe it makes clear, first, that First Marblehead
10 had no involvement in the complaint of debt collection
11 activity. It was the securitizer of these trusts in
12 2002 to 2008, and none of its affiliates or
13 subsidiaries had anything to do with the trust since
14 2012, which is two to three years before the complaint
15 of debt collection activity.

16 So as I said, we made three points; the first
17 being no personal jurisdiction, and again I'll refer to
18 the Morel declaration which establishes that First
19 Marblehead doesn't employ anyone in Maine at all.
20 That's at Paragraph 4.

21 Second, that neither First Marblehead Corporation
22 or its subsidiaries have acted on behalf of the trust
23 or directed anyone to act on behalf of the trust since
24 2012. That's the declaration at Paragraph 15.

25 And third, that First Marblehead had not entered

1 into any agreements with any defendants that would
2 allow it to direct the actions of U.S. Bank and the
3 actions that U.S. Bank takes on behalf of the trusts,
4 and that's at Paragraph 16.

5 Now, plaintiffs in their opposition offered a
6 number of exhibits and arguments to try to rebut the
7 Morel declaration and, in our opinion, those were not
8 sufficient.

9 First, they essentially argued that the collective
10 efforts by the other defendants can be imputed to First
11 Marblehead, and they rely upon Your Honor's prior
12 opinion against U.S. Bank.

13 First, we think the Morel declaration states
14 otherwise and that there isn't any evidence that
15 plaintiffs have proffered to rebut that declaration.
16 We also think Your Honor's prior opinion on U.S. Bank,
17 there were more facts there with respect to the
18 relationship between U.S. Bank and Transworld and
19 Turnstile, such as Transworld had to obtain U.S. Bank's
20 approval before negotiating and revising borrower's
21 payment schedule.

22 There are no documents or other facts that support
23 any sort of relationship here with respect to First
24 Marblehead and its ability to do anything with respect
25 to U.S. Bank in those collection activities.

1 Second, plaintiffs argue that specific personal
2 jurisdiction exists because of First Marblehead's
3 involvement in the loan securitization process. Now,
4 we also believe that this allegation is not enough to
5 establish personal jurisdiction.

6 We would refer Your Honor to the Countrywide case
7 and its fact pattern, which we believe is very
8 analogous to the case here. There, the court found no
9 personal jurisdiction with respect to the
10 non-defendants -- excuse me, nonresident defendant, in
11 that case Barclay's, which participated in creating of
12 offering documents like prospective supplement.

13 The court found that no personal jurisdiction
14 existed there because the defendant did not know that
15 its securities would be sold in Nevada, didn't execute
16 its contracts with Nevada or aim its activities toward
17 the plaintiffs in Nevada.

18 Similarly here, First Marblehead did not have any
19 contacts with Maine when it was securitizing student
20 loans. Now, granted there were Maine loans that were
21 securitized, but we believe that that activity was too
22 attenuated to satisfy the related to aspects of
23 personal jurisdiction, and the complained of activity
24 here again relates to debt collection activity, not the
25 propriety of the securitization process and that

1 process occurred in 2002 to 2008. The most relevant, I
2 think, latest securitization would be 2007, which is
3 six or seven years before the complaint of debt
4 collection activity.

5 Third, plaintiffs argue that First Marblehead and
6 its subsidiaries administered the loans and managed a
7 database that other defendants allegedly used to
8 collect the debt. We too believe that that argument is
9 flawed.

10 As an initial matter --

11 THE COURT: Let me interject --

12 MS. LAWRENCE: Sure.

13 THE COURT: -- before we get to the database.
14 I want to go back to the argument you just made and ask
15 you this.

16 If I conclude -- if I were to conclude that no, in
17 fact, your client's circumstances are more similar to
18 U.S. Bank than you'd like them to be, nonetheless does
19 your argument that its direct involvement ended in the
20 spring of 2012 really end the analysis?

21 MS. LAWRENCE: Well, I think one correction.
22 My client was not involved in 2012. There was
23 subsidiaries of my client. My client was the
24 securitizer, and I do think that that is important here
25 because there aren't any allegations of vicarious

1 liability in the complaint.

2 THE COURT: All right. So the fact that your
3 client wasn't even involved as of 2012, I take it,
4 would end the discussion.

5 How about if I were to conclude that, in fact,
6 your client was involved until the spring of 2012; in
7 other words, that, in fact, there was some other
8 involvement by your client. Does the lack of
9 involvement beginning in the spring of 2012 also end
10 the case?

11 MS. LAWRENCE: I think that it does because of
12 the complaint of debt collection activity for these
13 plaintiffs occurred in -- one, I believe, was in 2014
14 or perhaps two, one was in late 2015, and I think that
15 the cases that I would refer you to, I think maybe it's
16 the -- I think that that -- there has to be a
17 relatedness to the complained of activity and -- for
18 there to be personal jurisdiction.

19 The fact that my clients have not been involved,
20 or my client and its subsidiaries have not been
21 involved in two to three years I think suggests very
22 strongly that there is not -- that does not satisfy the
23 relatedness prong. There would need to be some action
24 that my client undertook with respect to these
25 plaintiffs that they have not alleged that they

1 undertook.

2 THE COURT: How about the June 27th prospectus
3 that names your client as being -- as engaged with
4 these trusts in some fashion -- they didn't explain
5 what the role is -- but what's the legal significance
6 of that evidence?

7 MS. LAWRENCE: So the prospectus again refers
8 to my client as being involved in securitization of the
9 loans, which again occurred from 2012 to 2008. The
10 securitization of the loans doesn't really have
11 anything to do with the complaint of debt collection
12 activity, Your Honor.

13 THE COURT: Okay. All right, I interrupted
14 you. Anything further?

15 MS. LAWRENCE: I have two further points if I
16 may, Your Honor.

17 THE COURT: Okay.

18 MS. LAWRENCE: The two other arguments that
19 plaintiffs make, the first is that First Marblehead and
20 its subsidiaries administered the loans and managed a
21 database that other defendants used to unlawfully
22 collect debts on the loans, in addition to the fact
23 that, you know, as I said previously, there are no
24 allegations with respect to -- there are insufficient
25 allegations with respect to vicarious liability.

1 I would refer Your Honor to the De Castro case,
2 which -- from the 1st Circuit which relates --
3 basically says the parents' ownership of the sub is not
4 enough to impute personal jurisdiction on that parent.

5 But even if it was, this isn't -- in our opinion,
6 there's still -- access to a database still is
7 insufficient to impute that First Marblehead could
8 foresee being sued in Maine. And there are, I think,
9 two cases that we rely upon that are factually
10 analogous here.

11 That's the Media3 case, in which the plaintiffs
12 had a website that people could access and did
13 access -- that case was a Massachusetts case -- where
14 it accessed them in Massachusetts and the court found
15 that even though -- this was, you know, a website that
16 was available anywhere in the country, that no one from
17 Massachusetts was directly targeted by that website and
18 therefore it wasn't sufficient to instill personal
19 jurisdiction.

20 The other case --

21 THE COURT: Let me interrupt. Isn't it
22 distinguishable that in this situation, we've got a
23 database that is not universally available on the Web,
24 I assume --

25 MS. LAWRENCE: Correct, yes.

1 THE COURT: -- so it's really proprietary
2 information that's been made available for purposes of,
3 as it turns out, specific debt collection in the state
4 of Maine in support of these defendants who are in the
5 case.

6 I mean one can imagine what additional facts might
7 be established that it really is critical or could be
8 deemed critical to the collection efforts that occurred
9 in this case; why wouldn't that be enough?

10 MS. LAWRENCE: So I would refer Your Honor to
11 the second case I was thinking of, which is the
12 Shirokov case, which, I think, also is very factually
13 analogous here.

14 There there was -- this was a scheme that involved
15 a number of defendants who apparently were involved in
16 some -- they would send these letters to people saying
17 that they had infringed a copyright and there was this
18 scheme to get people to pay them money to settle their
19 claims when, in fact, it was alleged that they really
20 didn't have those claims.

21 One of the defendants in that case was a U.K.
22 company who basically looked for all these people who
23 infringed on this IP, identified them, and then sent
24 them to other defendants to send the collection
25 letters, which is analogous, in my opinion, to the

1 facts here.

2 And even there, you know, the argument was, as
3 Your Honor is saying, there's no way these other
4 defendants could have sent these collection letters to
5 the plaintiffs if not for this information -- not a
6 website -- but this information that another defendant
7 had collected from them, and there too the court found
8 that personal jurisdiction over that United Kingdom
9 defendant was too attenuated and remote.

10 And for Your Honor's reference, that's -- I'm
11 going to say this wrong -- Shirokov v. Dunlap, 2012 WL
12 1065578, which is a District of Massachusetts case from
13 March 27, 2012.

14 The final point I would make on personal
15 jurisdiction is that there is an argument that
16 plaintiffs made that because First Marblehead received
17 some of the money that was collected that -- through
18 the TERI bankruptcy at the same time that it knew or
19 should have known its agents were collecting debts
20 using that database, that that establishes personal
21 jurisdiction here.

22 First, I would say, First Marblehead did not have
23 agents collecting debts, which was established through
24 the Morel declaration; and second, I think receipt of
25 payments related to a bankruptcy, which was filed in

1 Massachusetts more than six years before any of the
2 payments were received, also is too attenuated.

3 It essentially would open up any unsecured
4 creditor in a bankruptcy anywhere to personal
5 jurisdiction in all 50 states, and I just can't believe
6 that that can be the law.

7 I will -- I know I've been talking for a while, so
8 I will rest on the standing issue on my papers. I
9 believe that a lot of these facts again fail to
10 establish standing in this case.

11 And the last comment that I would make with
12 respect to the failure to state a claim is that really
13 the only -- plaintiffs essentially have conceded that
14 the Fair Debt Collection Practices Act and the Maine
15 Fair Debt Collection Practices Act is time-barred.

16 They didn't respond to that argument, and the fact
17 that my clients have not been involved since 2012,
18 which was established in the second amended complaint,
19 I think makes clear that those claims are time-barred.

20 On the Maine Unfair Trade Practices Act, we don't
21 believe that plaintiffs have pointed to a single act
22 that is unfair or deceptive and our argument would be
23 that, you know, maintenance of a database 2 to 3 years
24 before the alleged debt collection activity again is
25 too attenuated to satisfy that claim.

1 THE COURT: Thank you.

2 MS. LAWRENCE: Thank you.

3 THE COURT: Attorney Dill. Attorney Dill, I
4 wonder if you can begin with those last points.

5 Did you -- have you waived any argument with
6 respect to the Fair Debt Collection Practices Act and
7 the Maine Unfair Trade Practices Act --

8 MS. DILL: No.

9 THE COURT: -- as to this defendant?

10 MS. DILL: No, I have not. And speaking of
11 too attenuated, I mean these loans were taken out in
12 2004 and 2005 and now they're just being collected in
13 Maine. I mean the shoe is on the other foot here.

14 It's the student borrowers who are suffering from
15 this delay in debt collection and the reason why First
16 Marblehead is identified as a defendant, as a debt
17 collector defendant, is because in researching and
18 investigating the claims, the Consumer Finance
19 Protection Bureau, you know, has targeted First
20 Marblehead for its debt collection activity.

21 First Marblehead has, you know, filed a Form 8K,
22 Document 202-9, that specifically identifies the letter
23 from the Consumer Financial Protection Bureau notifying
24 First Marblehead that -- and I'm summarizing -- that
25 its debt collection activity related to the National

1 Collegiate Student Loan Trust is the subject of their
2 potential enforcement action.

3 THE COURT: That's so general information. It
4 doesn't really establish anything with respect to your
5 clients; does it?

6 MS. DILL: I think it -- well, I think its --
7 my clients have alleged in the complaint that First
8 Marblehead is a debt collector. My clients have
9 alleged that First Marblehead is an agent and in
10 collusion with the other defendants who are, you know,
11 profiting off of fraudulent activity in Maine state
12 courts. And I think the 8K and the information that we
13 know, that the federal government is also inquiring of
14 First Marblehead and its debt collection activities, is
15 certainly relevant to a motion to dismiss.

16 THE COURT: Well, I didn't say it's not
17 relevant, but is it enough to assert a claim in this
18 case? I mean this generalized information that First
19 Marblehead is within the radar of the consumer debt --
20 the consumer agency --

21 MS. DILL: First Marblehead was the debt --
22 first of all, First Marblehead organized 8,000 or so of
23 Maine loans, all right. So 8,000 Maine student
24 borrowers signed up for loans thanks to First
25 Marblehead and First Marblehead made a lot of money --

1 THE COURT: But the securitization of loans is
2 not what your case is about; is it?

3 MS. DILL: No, but they're trying to say
4 that's all they did. First Marblehead also was the
5 special servicer for these loans.

6 THE COURT: Until 2012.

7 MS. DILL: Well, they say -- yes, until 2012
8 and the guarantor in the -- in Sarah Thurlow's (sic)
9 case, the guarantor apparently bought her loan in April
10 of 2012 and in the Winne case, the guarantor apparently
11 bought her loan in March of 2010 when First Marblehead
12 was the servicer.

13 THE COURT: Okay. Now, Attorney Lawrence
14 makes a point that you might be interchangeably
15 referring to First Marblehead as -- actually
16 subsidiaries of First Marblehead; are you? Do you have
17 the right defendant?

18 MS. DILL: It's really notable who is the
19 right defendant given the attempts by these defendants
20 to make it impossible to know. I mean First Marblehead
21 Corporation is the parent company and First Marblehead
22 Education Resources is a subsidiary and First
23 Marblehead Data Services was the administrator of the
24 trusts.

25 It seems to me that if, in fact, I've identified

1 the wrong party, since First Marblehead took the
2 initiative to file a motion to change the name, then it
3 could file a motion to change the defendant.

4 I mean what are Maine student borrowers -- you
5 know, what are we supposed to do here? All these
6 corporations make it absolutely impossible to figure
7 out what the heck they're doing on purpose. They're
8 purposefully --

9 THE COURT: Assuming that you've got the right
10 defendant, have you alleged any facts from which,
11 viewing the complaint in the light most favorable to
12 your clients, I can plausibly conclude that U.S. Bank,
13 Turnstile, Transworld and Abrahamsen, for that matter,
14 the law firm, were acting as agents of First Marblehead
15 Corporation?

16 MS. DILL: Well, I think you have to accept my
17 allegations as true.

18 THE COURT: Which allegations?

19 MS. DILL: Well, in my response, which is
20 Document 202, I identify all of the allegations in the
21 complaint and I say in Paragraph 19 of the second
22 amended complaint, U.S. Bank, Wilmington, First
23 Marblehead and the trusts knowingly employed people in
24 Maine to collect debts in violation of federal and
25 state law.

1 And then I identified all the other allegations
2 that identified First Marblehead and include the fact
3 that First Marblehead is a debt collector, and I think
4 that that is fair since the federal government has said
5 that it is a debt collector. And that First Marblehead
6 is acting in agency with these other defendants and in
7 collusion as part of this scheme to double-dip, reap
8 the rewards of the plan trustee and also reap the
9 rewards of debt collection activity.

10 THE COURT: So the question is whether under
11 the pleading standards that I'm obligated to apply,
12 your characterization of U.S. Bank, Turnstile and the
13 others as being agents of First Marblehead, that's a
14 conclusion for purposes of Iqbal/Twombly; isn't it?
15 That's not enough for me to rest on that, that you say
16 that there's an agency relationship.

17 Is there anything more in your complaint that I
18 can look to and say yeah, there could be an agency
19 relationship based on these specific allegations?

20 MS. DILL: Well, when you say in the
21 complaint, now their motion to dismiss is under
22 12(b)(6) and 12(b)(1). So under 12(b)(6), I think
23 there's enough to -- in the allegations that there's an
24 agency relationship because I allege it and under 11 --
25 you know, Rule 11 --

1 THE COURT: Well, you can allege there's an
2 agency relationship, but it seems to me you've got to
3 do a little more than that; don't you? I mean you've
4 got to point to some facts that actually bears out that
5 conclusion.

6 MS. DILL: Well, if you look at, for instance
7 -- like I said, there's a lot of litigation in all
8 this, so it's not just me saying that First Marblehead
9 is an agent. I mean I've included in Document 202-23 a
10 memorandum of order that discusses the relationship
11 between First Marblehead Corporation and Education
12 Resources Institute.

13 There's a case, In re First Marblehead Corp.
14 Securities Litigation, it's 2009 U.S. Lexis 68423, that
15 describes the sort of convoluted relationships between
16 First Marblehead and TERI and the other defendants.

17 I mean they bought and sold information, they
18 acted as -- First Marblehead did the securitization
19 process, First Marblehead did risk management, First
20 Marblehead did all kinds of things that are described
21 in this decision, and so I think it's reasonable to
22 assume that First Marblehead, as the special servicer,
23 as the creator of this database, as the purchaser of
24 TERI, acted on behalf of the trusts in this debt
25 collection activity and that inference and those

1 allegations are supported by the fact that First
2 Marblehead issued an 8K stating that it was the subject
3 of a federal investigation for its debt collection
4 activity, and for the decisions that I included in the
5 plaintiffs' response to First Marblehead Corporation's
6 motions to dismiss.

7 THE COURT: All right. Anything else?

8 MS. DILL: Would you like me to talk about
9 anything else? Are there any other questions that I
10 can -- I think, I just want to point out that the
11 complaint alleges collusion and the complaint describes
12 a putative class of Maine state borrowers that simply
13 want to have the opportunity since they were approached
14 by First Marblehead -- First Marblehead reached into
15 Maine and through its securitization process extracted
16 over 4,000 Maine loans and bundled them up and sold
17 them to investors, who continue to make a lot of money,
18 and now hundreds of Maine students are being sued in
19 Maine and now all of these defendants say that they
20 don't have any connections with Maine.

21 And I say that given the allegations and what we
22 know to date, and given the information that's been
23 provided, that the Court not only has jurisdiction, not
24 only have the plaintiffs stated a claim, but even if
25 there's some doubt, that this Court has flexibility to

1 decide the jurisdiction question at a later date. That
2 there could be a reasonable amount of discovery that
3 could clarify some of these issues, that it's not an
4 unfair burden on these defendants given electronic case
5 filing, given their resources compared to student
6 borrowers' resources.

7 And in terms of any argument about extenuation or
8 time period, my goodness, you can imagine these student
9 borrowers who are being sued now on debts that they
10 incurred in 2004, 2005, 2006, 2001. I mean it's
11 difficult and it's not just difficult for these
12 defendants who have, you know, 20 good lawyers, it's
13 difficult for students.

14 THE COURT: Let me ask you to address the
15 motion to supplement the record in this case. The
16 deposition in this -- that you're relying upon doesn't
17 mention Wilmington at all and it does -- there is
18 testimony with respect to First Marblehead, but it's
19 all in its involvement up to 2012.

20 How else does -- well, how does this deposition
21 support your position on these motions?

22 MS. DILL: Well, I just want to point out, in
23 case you don't know, this is Mr. Luke in the audience,
24 so he's the person whose deposition we're talking about
25 and I think it's fair for Wilmington and First

1 Marblehead to make their arguments about not having
2 notice, but with all due respect, when I noticed the
3 deposition, I had no idea that Transworld Systems was
4 going to appear as the 30(b)(6) representative of the
5 trusts. It was a surprise to me.

6 THE COURT: Putting aside for the moment the
7 question of whether I should -- whether it's
8 permissible under Rule 32, and I'll just tell you right
9 now that I'm -- first I want to hear from the
10 defendants -- but I lean toward the view that I am
11 permitted to consider the deposition. My question to
12 you is why does it matter?

13 MS. DILL: Well, I think it matters because
14 Transworld System knows that the plaintiffs' theory of
15 the case is that TERI purchased these loans and
16 therefore the trusts don't own them and therefore the
17 lawsuits are fraudulent, and nonetheless, when the
18 representative who's called to give information about
19 that has no idea, really has no idea whether TERI
20 purchased the loans.

21 Here's somebody who has no legal training who says
22 well, I know TERI didn't purchase the loans because I
23 looked at the docket and because some guys at First
24 Marblehead told me.

25 THE COURT: Okay. So is it your view that the

1 deposition is important at least with respect to the 13
2 trusts that seek dismissal in this case?

3 MS. DILL: Yes and it's also important because
4 it establishes that the trusts want, on the one hand,
5 to claim in state court that they are the custodian of
6 the American Education Services' records. They swear
7 out affidavits saying we are entitled to this amount of
8 money because these AES records that we extract from
9 the computer and print show us -- show that this amount
10 is due and what they fail to say to the state court is
11 that the same AES records show that TERI purchased the
12 loans.

13 So either they have that information at their
14 fingertips and they're willfully withholding it or they
15 don't have it, in which case they're not the custodian
16 of AES records. They're the custodian of some subset,
17 some subset of conveniently, you know, put together
18 records that support their claims, but are not, in
19 fact, all the records.

20 THE COURT: Thank you.

21 MS. DILL: Thank you. Attorney Lawrence, you
22 can respond first on the motion to supplement, please.

23 MS. LAWRENCE: Your Honor, we don't believe
24 that we received proper notice of the deposition, but
25 at the end of the day, we think that the deposition

1 actually supports our claims because it does make
2 clear, as even alleged in the second amended complaint,
3 that First Marblehead and its subsidiaries had nothing
4 to do with the trusts after 2012.

5 So when Attorney Dill gets up and speaks about,
6 you know, all of the things that happened with respect
7 to these databases, I think it's very important to
8 remember that as of 2012, my client had nothing to do
9 with these documents.

10 Again, I know Ms. Dill thinks it's very confusing
11 to figure out who did what and what corporate forum did
12 what, but I'm basing these arguments on publicly
13 available documents, SEC filings, that explain what
14 First Marblehead did and what its subsidiaries did, and
15 First Marblehead was the securitizer. It didn't have
16 anything to do with servicing the trust. It didn't
17 have anything to do with administration of the trust.

18 A few other quick points if I may, Your Honor.
19 The CFPB Morel response, which Attorney Dill has
20 brought up a few times, if you look at the 8K, in
21 addition -- let me start over.

22 If you look at the 8K, it makes clear that the
23 investigation involves activities that occurred before
24 2012 or before. So again, we think it actually
25 supports our claims that there isn't personal

1 jurisdiction, that there's failure to state a claim and
2 that there is no standing.

3 And as Your Honor said, it's an investigation into
4 generalized conduct. It is not connected to -- there
5 are no allegations, and even from Attorney Dill, that
6 that conduct is somehow connected to the plaintiffs in
7 this case.

8 The other thing that I would say, two other quick
9 points, Attorney Dill in the first question you asked
10 her was whether or not she had waived her FTPCA -- I'm
11 sorry, Maine FTPA claims and the fact that they're
12 time-barred. I don't see anything in her opposition
13 and I didn't hear anything today other than her saying
14 no, I didn't waive this, that actually sets forth any
15 argument in support of why her claims are valid and not
16 time-barred.

17 The fact that my client -- I know I repeat this a
18 lot -- but the fact that my client had no involvement
19 since 2012 in and of itself, I believe, establishes
20 that these claims are time-barred.

21 And the last thing I would say, her allegations of
22 agency and collusion, I don't see any facts supporting
23 that and I think that there needs to be facts
24 supporting that, and perhaps part of this is the fact
25 that there is so much group pleadings in this

1 complaint, the fact that essentially she replaced
2 defendants with debt collector defendants and then
3 alleged all of the defendants as debt collector
4 defendants, but my client doesn't know through that
5 group pleading what it is alleged to have -- who's
6 alleged to have colluded with, what this agency
7 relationship is. There frankly aren't any facts to
8 support it.

9 THE COURT: Thank you, Attorney Lawrence.
10 Attorney Arnold, you can respond on the motion to
11 supplement.

12 MR. ARNOLD: Your Honor, on the motion to
13 supplement, Your Honor, you hit the nail on the head.
14 The proposed transcript to be considered doesn't
15 mention Wilmington Trust? If anything, we also were
16 not noticed to the deposition. Putting that procedural
17 objection aside, the fact of the matter is is that it's
18 fully consistent with what we've said.

19 Wilmington Trust acted solely as owner trustee or
20 statutory trustee and it's a very limited ministerial
21 role, and there are no questions or any information
22 pertaining to that role and there was nothing to
23 undercut that role or what we've said about that role
24 in that deposition.

25 THE COURT: Thank you. Attorney Alltmont, any

1 final words on the motion to supplement?

2 MR. ALLTMONT: Yes, Your Honor. First, it's
3 inappropriate for Attorney Dill to attempt to amend the
4 pleadings through greater briefing and the deposition
5 transcript.

6 I also want to address her allegations that the
7 deposition transcript somehow supports her claim that
8 TERI repurchased these accounts. First off, the
9 deposition was specific as to two plaintiffs, Coffey
10 and McMullen, and Mr. Luke specifically denied those
11 claims or rejected those claims.

12 Also, as it relates to the motion to dismiss the
13 13 trust plaintiffs -- trust defendants, the deposition
14 is completely irrelevant and has no bearing on the
15 standing of the plaintiffs to assert claims against
16 those 13 trust defendants.

17 THE COURT: Thank you. Attorney Dill, as the
18 moving party on the motion to supplement, you get the
19 final word. Anything else on this? This is on the
20 motion to supplement.

21 MS. DILL: I think the deposition transcript
22 makes clear that Mr. Luke, in his position as senior
23 litigation paralegal, travels around the country
24 representing all of the trusts and represents the
25 trusts in this case and in the state court collection

1 cases and therefore his testimony about how this
2 collection activity happens, and the databases on which
3 they rely, and, in my view, the unreliability of the
4 records that they use in state court proceedings is all
5 relevant to the trust.

6 This is a playbook on how the trusts, through TSI,
7 U.S. Bank and other defendants across the country, are
8 taking advantage of student borrowers.

9 THE COURT: Thank you. All right, counsel,
10 thank you for your briefs and argument. I will take
11 this under advisement and I'll issue a written
12 decision.

13 What else is pending in this case? Is there
14 anything else pending in this case at this time? Any
15 motions pending at this time? Someone remind me where
16 we're at otherwise.

17 MR. ALLTMONT: Your Honor, there is the
18 plaintiff Winne's motion for fees recovered in the
19 offer of judgement.

20 THE COURT: That's right, yes.

21 MR. ALLTMONT: And there has not been
22 briefing.

23 THE COURT: So that briefing is in progress,
24 right?

25 MR. ALLTMONT: Yes.

1 THE COURT: And are there any other
2 outstanding motions at this time? So once these
3 motions and the attorneys fees question have been
4 decided, we will be ready for a case management
5 conference to schedule the case; is that fair?

6 MS. DILL: Yes, Your Honor.

7 THE COURT: Everyone agrees? All right,
8 great. Thank you all. Have a great day. The Court
9 will be in recess.

10 (End of proceeding).

11 C E R T I F I C A T I O N

12 I, Dennis Ford, Official Court Reporter for the United
13 States District Court, District of Maine, certify that
14 the foregoing is a correct transcript from the record
15 of proceedings in the above-entitled matter.

16 Dated: August 9, 2017

17 /s/ Dennis Ford

18 Official Court Reporter
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